IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-274

WINSTON-SALEM/FORSYTH COUNTY
BOARD OF EDUCATION,

Petitioner

v.

CATHERINE SCOTT, et al.,

Respondents

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

SUPPLEMENTAL STATEMENT OF PETITIONER

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The Petitioner filed a petition for writ of certiorari on August 23, 1971. At the same time, an application to stay the Order of the Court of Appeals for the Fourth Circuit pending disposition of the Board's petition for writ of certiorari was filed with the Chief Justice as Circuit Justice for the Fourth Circuit. The application

for stay was denied on August 31, 1971, in an opinion filed by the Chief Justice. In that opinion, the Chief Justice suggested that the Orders entered by the District Court on June 22 and July 26, 1971, pursuant to the decision of the Court of Appeals on June 10, 1971 (the decision sought to be reviewed by certiorari) may have misinterpreted this Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) and related cases.

In the light of the statements of the Chief Justice in his opinion denying the stay, the Petitioner thought it appropriate to request that the District Court reconsider and vacate its Orders of June 22 and July 26, 1971, on the grounds that these Orders went too far in requiring the Petitioner to implement the plan under which it is now operating. Accordingly, the Petitioner filed a motion in the District Court on September 9, 1971, a copy of which is attached to this Supplemental Statement and incorporated herein by reference. This motion has not yet been acted upon.

The purpose of this Supplemental Statement is to inform the Court of this pending motion in the District Court. The Petitioner

will inform the Court of the disposition of the motion by the District Court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

CATHERINE SCOTT, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	No. C-174-WS-68
	)	
WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, et al.,	)	
	)	
Defendants	)	

MOTION

Defendant, Winston-Salem/Forsyth County Board of Education, respectfully moves that the Court reconsider and vacate its order of July 26, 1971, requiring "that the Winston-Salem/Forsyth County Board of Education proceed immediately to implement the 'Revised Pupil Assignment Plan for the 1971-72 School Year,' which was submitted to the Court

June 29, 1971, pursuant to the June 10, 1971, mandate of the Court of Appeals for the Fourth Circuit and the June 22, 1971, Order of this Court, and that said plan be put into effect as of the opening of the 1971-72 school year," and also this Court's Order of June 22, 1971, pursuant to which said plan was submitted, on the following grounds:

(1) On August 31, 1971, the Honorable Warren E. Burger, Chief Justice of the United States and Circuit Justice for the Fourth Circuit delivered an opinion denying a stay of the decision of the United States Court of Appeals for the Fourth Circuit dated June 10, 1971, and subsequent orders of this Court entered pursuant thereto, pending disposition of the Board's Petition for Writ of Certiorari to review the decision of the Court of Appeals. However, in that opinion, the Chief Justice made certain statements that suggest that the Winston-Salem/Forsyth County Board of Education, this Court, and perhaps the Court of Appeals, have misconstrued Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) and related cases. Specifically, the Chief Justice stated:

> "The Board's resolution reciting that it was adopting the revised plan under protest, on an understanding

that it was required to achieve a fixed 'racial balance' that reflected the total composition of the school district is disturbing. It suggests the possibility that there may be some misreading of the opinion of the Court in the Swann case. If the Court of Appeals or the District Court read this Court's opinions as requiring a fixed racial balance or quota, they would appear to have overlooked specific language of the opinion in the Swann case to the contrary. Rather than trying to interpret or characterize a holding of the Court, a function of the Court itself, I set forth verbatim the issues seen by the Court in Swann the essence of the Court's disposition of those issues:

> 'The central issue in this case is that of student assignments, and there are essentially four problem areas:
>
> (1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what the limits are, if any, on the rearrangement of school districts and attendance zones as a remedial measure; and

(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.' 402 U.S. at 22.

"After discussing the problem, the opinion concluded:

'If we were to read the holding of the District Court to require as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.' 402 U.S. at 24. (Emphasis Added.)

"Nothing could be plainer, or so I have thought, than Swann's disapproval of the 71%-29% racial composition found in the Swann case as the controlling factor in assignment of pupils, simply because that was the racial composition of the whole school system. Elsewhere in the Swann opinion, we had noted the necessity for a District Court to determine what in fact was the racial balance as an obvious and necessary starting point to decide whether in fact any violation existed; we concluded, however, that 'the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.'

* * * * *

"This case is further complicated by what seems to me some confusion respecting the standards employed and the findings made by the District Court and the terms of the remand order of the Court of Appeals. Under Swann and related cases of April 20, 1971, as in earlier cases, judicial power can be invoked only on a showing of discrimination violative of the constitutional standards declared in Brown v. Board of Education, 347 U.S. 483 (1954). In findings dated June 25, 1970, the District Court sent the

case back to the School Board for changes to eliminate the dual school system; it approved the plan submitted subject to several modifications. The modified plan was before the Court of Appeals when this Court decided the Swann case. The Court of Appeals in its remand following the decision in Swann did not reverse the District Court's findings, but rather directed reconsideration in light of Swann. In the circumstances that was an appropriate step. The present status of the findings is not clear to me, but the District Court on reconsideration following the remand seems to have thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in Swann suggests a possible confusion on this point. I do not attempt to construe that language, but simply recite it verbatim: 'The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.' 402 U.S. at 24."

In a footnote, the Chief Justice went on to say:

"By way of illustration, if the record showed--to take an extreme example of a patent violation of Swann--that the average time was three hours daily or that some were compelled to travel three hours daily where school facilities were available at a lesser distance, I would not hesitate to stay such an order forthwith until the court could act at least as to the students so imposed on. The burdens and hardships of travel do not relate to race; excessive travel is as much a hardship on one race as another. The feasibility of a transfer program to give relief from such a patently offensive transportation order as the one hypothesized would also be relevant."

The Chief Justice wrote the opinions in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), and Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971). Having done so, he is in the best position of anyone to interpret the holdings of these cases. It appears clear from his opinion denying the application for a stay in this case that he does not believe that the Board of Education was required to achieve the results decreed by this Court's orders of June 22 and July 26, 1971. It would, therefore, be appropriate for this Court to reconsider and to vacate

its orders and to permit the Board to return to a plan of pupil assignment that does not impose the hardships and burdens of the Larsen Plan found by this Court not to be constitutionally required in its June 25, 1970, order, which as pointed out by the Chief Justice, was not reversed by the Court of Appeals.

(2) The implementation of the "Revised Pupil Assignment Plan for the 1971-72 School Year" has demonstrated its impracticality and has revealed hardships and burdens on the students of the system that should be alleviated. Some of these hardships are enumerated as follows:

(a) Thousands of elementary students, including six and seven year old students, are forced to travel great distances going to and from school, even though they live quite close to a school which they attended prior to the imposition of the present pupil assignment plan. In his opinion, the Chief Justice pointed out that if "some students were compelled to travel three hours daily where school facilities were available at a lesser distance, I would not hesitate to stay such an order forthwith until the Court could act at least as to the students so imposed on." The

Chief Justice refers to this as "an extreme example of a patent violation of Swann"; there is every indication from the opinion that he would not require that the maximum time be three hours before affording relief, but that some lesser time of travel would also be considered an undue hardship where school facilities are available at a lesser distance.

(b) In order to implement the plan, it has been necessary to make extensive use of Interstate 40 and the North-South Expressway, the two major traffic arteries through the county, as a means of transporting students back and forth. The morning runs of the buses correspond with the rush-hour traffic. The governors of school buses are set at 35 miles per hour, the maximum lawful speed for school buses under state law (G. S. 20-218). The top speed of a loaded school bus going up even a slight incline is less than that, and with the rolling, hilly terrain existing in this County, the uphill speed of a loaded school bus is often as slow as 20 miles per hour. The speed limit on Interstate 40 and the North-South Expressway outside of

the city is 65 miles per hour. It is not unusual for cars and trucks to exceed even those speed limits. Travelling at only about one-half, or less, the speed of most vehicles on these highways, and ten miles per hour or more below the posted minimum speed of 45 miles per hour on Interstate 40, each bus using the expressways incurs a great risk of a tragic accident. Further, the congestion caused by the school buses during the morning rush hour on all streets and highways, but especially Interstate 40, which is the most heavily travelled highway in the State, greatly increases the risk of an accident and impedes the normal movement of traffic. School buses make more than one hundred trips on Interstate 40 each day.

(c) The school system lacks sufficient buses to operate an effective transportation system even on the basis of staggered opening times. There are serious problems of overcrowding on many buses; many students are forced to stand in the aisles. Some buses are forced to travel inordinately long routes; schedules have had to be staggered more than they otherwise would have and

students are forced to leave home earlier and arrive in the afternoon later because of the absence of sufficient transportation. If the school system had a sufficient number of buses, it would increase the number of bus trips made on busy highways and add to the rush-hour traffic congestion.

(d) The additional travel time which has been imposed upon thousands of pupils, particularly at the elementary level, who might otherwise attend a school near their places of residence deprives these pupils of approximately one hour each school morning and another hour each school afternoon--time for sleep, study, recreation or other activities of which they should not be deprived. Under Chief Justice Burger's opinion of August 31, 1971, it appears that the Supreme Court did not intend for Swann to be so interpreted as to require such a harsh result.

The citizens of Forsyth County have patiently borne what they were convinced to be an unjust but unavoidable plan of pupil assignment for their schools. They, the Board of Education, and this Court believed the plan unavoidable because of the Swann decision, as interpreted by the Court of Appeals.

They have now learned that the author of that opinion which has caused so much personal hardship believes that it has been misinterpreted. The results of that interpretation have been unfortunate; how much more unfortunate to continue on a course that, as it now develops, was not intended by the author of the opinion.

WHEREFORE, the Winston-Salem/Forsyth County Board of Education respectfully moves that the Court reconsider and vacate its Orders of June 22, 1971, and July 26, 1971; and that Winston-Salem/Forsyth County Board of Education not be required to operate its school system under the "Revised Pupil Assignment Plan for the 1971-72 School Year" as directed in said July 26, 1971, Order.

It is requested that this Motion be set for oral argument at the earliest practicable date and that movant be permitted to offer evidence at the hearing in support of this Motion.

Respectfully submitted,

/s/ W. F. Womble
W. F. Womble

/s/ John L.W. Garrou
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CERTIFICATE OF SERVICE

This is to certify that service of the foregoing Motion was made upon all parties by mailing copies thereof in the United States Mail at Winston-Salem, North Carolina, on the 9th day of September, 1971, postage prepaid, in envelopes addressed to: Mr. Julius LeVonne Chambers, Chambers, Stein, Ferguson & Lanning, 237 West Trade Street, Charlotte, North Carolina, Attorney for the Plaintiffs; Mr. Ralph Moody, Deputy Attorney General, P. O. Box 629, Legislative Building, Raleigh, North Carolina, Attorney for the North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina; Mr. P. Eugene Price, Jr., Government Center, Winston-Salem, North Carolina, Attorney for the Board of County Commissioners of Forsyth County, North Carolina, which are the last addresses of said attorneys known to me.

/s/ W. F. Womble

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